

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
Lorillard Tobacco Company)	
)	
Motion for Declaratory Ruling Re: Section)	DA 01-2565
)	
73.1206 of the Commission's Rules)	
)	

ORDER

Adopted: March 12, 2007

Released: March 13, 2007

By the Chief, Media Bureau:

I. INTRODUCTION

1. Lorillard Tobacco Company ("Lorillard") filed a Motion for Declaratory Ruling ("Motion") regarding application of the Commission's rule concerning the broadcast of telephone conversations.¹ The American Legacy Foundation ("ALF") filed an Opposition to Lorillard's Motion,² and Lorillard responded.³ Broadcasters, public interest groups and other interested parties filed comments, and ALF and Lorillard submitted reply comments.⁴ For the reasons discussed below, we deny Lorillard's Motion.

II. BACKGROUND

2. In its motion, Lorillard asks that we rule that: (1) Section 73.1206 of the Commission's rules⁵ prohibits the broadcast of an advertisement or other programming material supplied to a broadcast

¹ Motion for Declaratory Ruling filed by Lorillard Tobacco Company (October 1, 2001). The Mass Media Bureau released a Public Notice seeking comment on Lorillard's Motion. *Public Notice*, DA 01-2565 (Nov. 5, 2001); *Public Notice, Erratum*, replacing Public Notice dated November 5, 2001 (Nov. 7, 2001).

² Opposition of ALF (October 16, 2001).

³ Response of Lorillard (October 26, 2001).

⁴ See Appendix A for a list of filings in this matter.

⁵ Section 73.1206 provides that:

Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as as

(continued....)

licensee by a third party if the licensee learns or has reason to know that the material includes a telephone conversation recorded “without the knowledge or permission of one of the parties to that telephone conversation”; and (2) the advertisement sponsored by ALF and broadcast on various radio stations during the summer of 2001 (the “Advertisement”) violates Section 73.1206.⁶ Lorillard complains that radio broadcasts of the Advertisement, which included the recorded response of Lorillard’s employees to a telephone call offering to sell dog urine as a source of urea to be used as an additive to tobacco products, were “obviously intended to embarrass and hold its employees up to public ridicule by implying that those employees knew of and somehow condoned the ridiculous and unfounded allegation that Lorillard uses dog urine in the manufacture of cigarettes.”⁷ Lorillard reports that although the Advertisement is no longer being broadcast,⁸ ALF has stated that future advertisements could make similar use of other secretly taped telephone conversations.⁹ Lorillard concedes that Section 73.1206, by its plain language, appears to “confine its applications to situations where the licensee is the party who places the telephone call to be broadcast.”¹⁰ Lorillard argues, however, that the regulatory history of the rule’s adoption and prior interpretations demonstrate that the rule was “designed to cover – and does encompass – situations where the telephone call is placed by a third party and then made available to the licensee for broadcast over the licensee’s stations.”¹¹ Lorillard contends that the rule would thus “comport with common sense and preclude a licensee from indirectly engaging in an activity that the licensee is otherwise prohibited from doing directly, thus protecting citizens against having their telephone conversations broadcast without their knowledge or consent.”¹²

3. ALF states that it is a non-profit foundation created in 1999 as a result of the Master Settlement Agreement between tobacco manufacturers and attorneys general from 46 states and five territories, and that its principal purposes include reduction of youth smoking.¹³ ALF explains that, as part of its advertising campaign targeted to teenagers, it recorded a telephone call placed by a

(...continued from previous page)

[sic] employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.

47 C.F.R. § 73.1206.

⁶ Motion at 1.

⁷ *Id.* at 1-2, 11.

⁸ Motion at 2-3. Lorillard reports that it filed letters of complaint with the stations it could identify as having broadcast the Advertisement, and that in late August, 2001, it was advised by some stations and ALF that the Advertisement is no longer being broadcast by any radio station. *Id.*

⁹ Motion at 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Opposition of ALF at 1. ALF states that its funding from the national tobacco settlement must be used, among other things, to “carry[] out a nationwide sustained advertising and education program to: (A) counter the use by Youth of Tobacco Products, and (B) educate consumers about the causes and prevention of disease associated with the use of Tobacco Products.” *Id.*

representative of ALF from New York to Lorillard in North Carolina.¹⁴ ALF's representative did not notify Lorillard employees that the call was being recorded, but ALF contends that New York, North Carolina, and federal law permit such recordings with one-party consent.¹⁵ ALF argues that the Advertisement, which included the recorded telephone call, does not violate Section 73.1206, pointing out that the commenters "overwhelmingly" agree that, by its plain language, Section 73.1206 encompasses only telephone recordings made by licensees.¹⁶ According to ALF, Lorillard's motion is fundamentally misguided and is an attempt to bypass the statutory and regulatory requirements for agency rulemaking.¹⁷ ALF also points out that, although the Commission may issue a declaratory ruling to terminate a controversy or remove uncertainty,¹⁸ there is no controversy to terminate because the Advertisement "involves a single spot that is no longer running, nor is there uncertainty to remove about the application of the rule in question."¹⁹ ALF maintains that its Advertisement, designed to reduce youth smoking, is a matter of public concern, similar to that validated in a recent Supreme Court case, *Bartnicki v. Vopper*, and broadcasters should not be prohibited from airing it.²⁰

4. ALF and most of the commenters argue that granting Lorillard's requests would violate the First Amendment's protection of free speech.²¹ They contend that implementing Lorillard's requested interpretation of the rule would place an enormous burden on broadcasters, who would need to ascertain that all recorded advertisements and material provided by third parties did not include telephone conversations that were recorded without the other party's knowledge or permission to broadcast.²² Lorillard and the two parties that support its position argue that requiring broadcasters to refrain from broadcasting materials supplied by third parties that include telephone conversations recorded without the

¹⁴ Opposition of ALF at 3. See Comments of Arnold Worldwide, Inc. (the lead advertising agency for ALF) at 2.

¹⁵ *Id.*

¹⁶ Reply Comments of ALF at 1.

¹⁷ Opposition of ALF at 5. ALF states that the Commission has long made clear that "[i]n the interest of preserving its limited resources, [it] will not issue declaratory rulings to resolve abstract questions of law," or "where there is no pending controversy and parameters of and 'uncertainty' are yet to be established." *Id.* at 6.

¹⁸ Pursuant to Section 1.2 of the Commission's rules, the Commission may issue a declaratory ruling to terminate a controversy or remove uncertainty. 47 C.F.R. § 1.2; 5 U.S.C. § 554(e).

¹⁹ Opposition of ALF at 6. ALF states that the Advertisement was broadcast on radio stations in a variety of markets in July 2001, but that it has not been broadcast since that time and there are no current plans to run it in the future. *Id.* at 3.

²⁰ Opposition of ALF at 10, citing *Bartnicki v. Vopper*, 532 U.S. 514, 121 S.Ct. 1753 (May 21, 2001) (court held that a broadcaster who aired a recording of a cellular phone conversation concerning a matter of public concern that was recorded by an unknown third party in violation of federal and Pennsylvania wiretap acts, and who lawfully received the recording from that individual, could not be held liable under the acts' prohibition of intentional disclosure of contents of illegally intercepted communications).

²¹ See, e.g., Comments of Media Access Project at 1-2; Comments of the National Association of Broadcasters ("NAB") at 12-14; Comments of National Association of Attorneys General at 2.

²² See, e.g., Comments of Saga Communications, Inc. ("Saga") at 3-4; Comments of Radio One at 1-2; Comments of NAB at 9-11.

knowledge or consent of the other party will not impose a substantial burden, and the benefits conveyed by securing the privacy of telephone calls outweigh that burden to broadcasters.²³

III. DISCUSSION

5. Under section 1.2 of the Commission's rules, the Commission "may . . . issue a declaratory ruling terminating a controversy or removing uncertainty."²⁴ The Commission has broad discretion whether to issue such a ruling.²⁵ In the instant case, we conclude that no declaratory ruling is warranted. There is no pressing controversy, and no uncertainty in light of the plain language of Section 73.1206 and Commission precedent.

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED that the Motion for Declaratory Ruling filed by Lorillard Tobacco Company IS DENIED.

7. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

²³ Reply to Opposition of Lorillard at 8. *See* Comments of Philip Morris at 4-5; Comments of Washington Legal Foundation ("WLF") at 8-12.

²⁴ 47 C.F.R. § 1.2.

²⁵ Telephone Number Portability, Order, CC Docket No. 95-116, 19 FCC Rcd 6800, 6810 ¶ 20 (2004). *See* Yale Broadcasting Co. v. FCC, 478 F.2d 594, 602 (1973).

²⁶ 47 C.F.R. § 0.283.

APPENDIX A
List of Filings

Motion

Lorillard Tobacco Company

Opposition

American Legacy Foundation

Reply to Opposition

Lorillard Tobacco Company

Comments

American Legacy Foundation

Arnold Worldwide, Inc.

CBS Broadcasting, Inc., Belo Corp., and Fox Television Stations, Inc.

Infinity Broadcasting Corporation

Media Access Project

National Association of Attorneys General

National Association of Broadcasters

Philip Morris Incorporated

Radio One

Saga Communications, Inc.

Washington Legal Foundation

Reply to Comments

American Legacy Foundation

Lorillard Tobacco Company